Petition

81-2054

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ALEXANDER L. STEVAS,
CLERK

No. _____

In the

SUPREME COURT OF THE UNITED STATES

_____ Term, 1982

UNITED STATES OF AMERICA

vs.

ROBERT JOHN SECHAN,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HAROLD GONDELMAN

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QUESTIONS PRESENTED FOR REVIEW

1. Does the attorney-client privilege prohibit the government from using the testimony of defendant's psychiatrist, over the defendant's objection, when the psychiatrist was, in the opinion of defense counsel, needed to provide effective assistance of counsel in the trial preparation to determine whether defendant would assert diminished mental capacity as a defense to the criminal charges and where psychiatric testimony, if not a defense to the substantive charges, could be taken into consideration by the court in sentencing a narcotics offender?

2. Does the defendant waive the attorney-client privilege where his attorney without any evidence of notice to the defendant furnished the government with a copy of the report of defendant's psychiatrist as counsel deemed required by the Standing Discovery Order?

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OPINIONS BELOW

The judgment and order of the United States District Court for the Southern District of Florida entered February 20, 1981 is set forth at page 6a of the Appendix.

The order of said District Court dated January 9, 1981, denying Defendant's Motion for New Trial is set forth at page 4a of the Appendix.

The unpublished Per Curiam opinion of the United States Court of Appeals for the Eleventh Circuit entered February 22, 1981, affirming the judgment of the United States District Court for the Southern District of Florida is set forth at page 3a of the Appendix.

The Per Curiam order of the United States Court of Appeals for the Eleventh Circuit dated April 7, 1982, denying rehearing is set forth at page 1a of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the United States District Court for the Southern District of Florida was entered on February 22, 1982 (App. 3a).

The Order of the United States Court of Appeals for the Eleventh Circuit denying rehearing was entered on April 7, 1982. (App. 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The defendant, Robert John Sechan, raised the issue of diminished mental capacity as a defense to the federal drug offenses charged.[1] (App. 6a). Pursuant to the standing discovery order of the district court (App. 9a), defense counsel [2] furnished the prosecution with a copy of a report written by Dr. Mutter, a psychiatrist

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1 Sechan was convicted on December 16, 1980. after a non-jury trial, of conspiracy to distribute cocaine (21 U.S.C. §§ 841(a)(1) and 846); possession with intent to distribute cocaine (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2)and distribution of cocaine (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. He was sentenced on February 20, 1981, to concurrent terms of six years in prison on each count followed by a special parole term of five years. (App.8a).

2 Defense counsel who furnished the report withdrew by reason of possible conflict and was replaced by other trial counsel.

who was hired originally by defense counsel on Sechan's behalf. [3]

The defendant did not call Dr. Mutter at trial. Instead Sechan's treating psychiatrist, Dr. Cerul, testified that it was his opinion that Sechan lacked the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. (App. 30a-36a) Instead of obtaining a court order to have Sechan examined by a psychiatrist on behalf of the government, the government called Dr. Mutter to rebut the treating psychiatrist's testimony. Dr. Mutter testified that, in his opinion, Sechan knew right from wrong and understood the consequences of his act. (App. 24a-27a) He also testifed to facts related to him by defendant although defendant chose not to testify in his defense.

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3 The defense needed the report in connection with the defense of diminished mental capacity and because the report could be used by the trial court in sentencing under 18 U.S.C. §§ 4251 (f)(2) and 4253.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Certiorari should be granted to resolve a split in the circuits over the applicability of the attorney-client privilege to psychiatric testimony.

The decision of the Eleventh Circuit in this case affirming the District Court's refusal to recognize the attorney-client privilege when a psychiatrist is secured by defense counsel for assistance in trial preparation and affirming the finding of the district court that the defendant waives the privilege when his attorney furnishes the government with a copy of the psychiatrist's report pursuant to a standing discovery order is in conflict with the decision of the Court of Appeals for the Third Circuit in United States v. Alvarez, 519 F.2d 1036 (3rd Cir. 1975).

While this Court has not addressed the question here involved directly, the Eleventh Circuit's non-recognition of the privilege under

the circumstances noted is inconsistent with this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981).

I. The Attorney-Client Privilege Prohibits the Government from Using the Testimony of Defendant's Psychiatrist, over the Defendant's Objection, When the Psychiatrist Was, in the Opinion of Defense Counsel, Needed to Provide Effective Assistance of Counsel in the Trial Preparation to Determine Whether Defendant Would Assert Diminished Mental Capacity as a Defense to the Criminal Charges and Where Psychiatric Testimony, Not a Defense to the Substantive Charges, Could Be Taken into Consideration by the Court in Sentencing a Narcotics Offender.

The decision of the Eleventh Circuit in this case affirming the judgment of the district court is in direct conflict with a decision of the Third Circuit in United States v. Alvarez, supra.

In Alvarez, the defendant's attorney applied to the court for authority to retain a

psychiatrist to conduct an examination of the defendant. The court authorized his retention, and the psychiatrist conducted an examination and prepared a letter report addressed to defendant's attorney. A copy of the report was turned over to the government pursuant to an order of court requiring that the government and defendant exchange copies of reports of physical and mental examinations of the defendant made in connection with the case. The court permitted the psychiatrist to testify over the defendant's objection. That objection was based upon the fifth amendment privilege against self-incrimination, the sixth amendment right to effective assistance of counsel, and the attorney-client privilege. The government contended that there was no fifth amendment issue and that any sixth amendment or attorney-client privilege was waived.

Reasoning that a contrary ruling would have the inevitable effect of depriving defendants of the effective assistance of counsel, the court held that the attorney-client privilege exists when a psychiatrist is secured by defense counsel for assistance in trial preparation. In so holding, the court stated:

> "The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting. . .But where, as here, the defendant does not call the expert the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself." 519 F.2d at 1046.

The extension of the attorney-client privilege has been acknowledged in several decisions of the Fifth Circuit (whose decisions prior to September 30, 1981 are binding on the district court in the instant case). The Fifth Circuit has recognized that the attorney-client privilege may, in appropriate circumstances, apply to non-lawyers. See, e.g., United States v. White, 617 F.2d 1131, 1135 (5th Cir. 1980); Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981).

II. The Eleventh Circuit's Non-Recognition of the Privilege Under the Circumstances in the Instant Case is Inconsistent with Estelle v. Smith.

This Court, in considering a similar situation, has upheld the applicability of the

attorney-client privilege to communications made by a defendant to a psychiatrist where the defendant, like Sechan in the instant case, was not advised before the psychiatric examination of his right to remain silent.

In Estelle v. Smith, supra, the defendant was indicted in Texas for murder, and the State sought the death penalty. The trial court ordered the State to arrange a psychiatric examination to determine the defendant's competency to stand trial. The defendant was not advised of his privilege against self-incrimination. The psychiatrist found the defendant competent and so advised the trial judge. The defendant was convicted, and at the penalty phase of the trial the psychiatrist was permitted to testify over objection that the defendant would be a danger to society.

In holding that defendant's fifth and sixth amendment rights had been abridged by the State's introduction of the psychiatrist's testimony at the penalty phase of the trial, this Court, in an opinion written by Chief Justice

Burger, cited Maness v. Meyers, 419 U.S. 449, 466 (1975), for the proposition that a defendant may not be aware of the scope of the fifth amendment, and the assertion of that right often depends upon legal advice from someone who is trained and skilled in the subject matter. 451 U.S. at 471.

Estelle v. Smith recognized that during the psychiatric examination the defendant was not in the presence of a person acting solely in his interest and that the psychiatrist's apparent role of neutrality changed, and he became at the sentencing trial an agent of the state recounting unwarned statements made in a post-arrest custodial setting.

In the instant case, Dr. Mutter was an agent of Sechan's attorney. (App. 17a-21a). He was not appointed by the court, and his examination was for the purposes of determining whether Sechan was capable of aiding his attorney in the preparation of his defense (App. 22a-24a), and to assist his counsel in deciding whether to raise the legal diminished mental capacity issue. (App. 28a-29a). The

psychiatrist's report could also be used by the trial court in sentencing under 18 U.S.C. § 4253. The effect of the trial court's allowing Dr. Mutter to testify for the government was to force Sechan to assist the prosecution in securing his own conviction from his own lips without the forewarning that anything he said could and would be used against him at trial. [4]

It is difficult to imagine a more chilling scenario than one in which defense attorneys would be inhibited from consulting with experts whose views may possibly conflict with the defense to be proffered for an accused for fear that, if they do so, they may be assisting the government in convicting their clients. The Eleventh Circuit's view places defense lawyers between Scylla and Charbybdis and certainly deprives defendants of the effective assistance of counsel.

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[4] In addition to his impressions of Sechan's mental state, Dr. Mutter testified to arguably factual material as well when he stated, "He knew that he was approached by someone who was trying to get him to sell some cocaine." (App. 26a).

III. Defendant Does Not Waive the Attorney-Client Privilege Where Defendant's Attorney Furnishes the Government with a Copy of the Report of Defendant's Psychiatrist pursuant to a Standing Discovery Order.

The District Court indicated that Sechan waived the privilege when his attorney furnished Dr. Mutter's report to the United States Attorney. (App. 19a)

The Standing Discovery Order of July 1, 1980 (App. 11a-12a) provides in relevant part:

> "B. The defendant shall permit the government to inspect and copy the following items
>
> * * *
>
> (2) Any results or reports of physical or mental examinations. . . "

The District Court stated during the trial:

> "I think that when Mr. Hirschhorn furnished Doctor Mutter's report to the United States Attorney, that in effect was a waiver..." (App. 19a)

The waiver issue was raised in Alvarez, and the Third Circuit ruled upon it. There the government contended that defendant had waived the attorney-client privilege by agreeing to the entry of a negotiated order requiring production of all reports without reference to whether the defendant intended to produce them at trial. The Alvarez court found no waiver and stated:

> But we do not construe it as a waiver of the attorney-client privilege. Rather we view it as a matter of convenience in trial preparation which enabled the government to prepare for cross-examination if the defendant decided to call any particular psychiatrist as a witness. Mr. Campion [defendant's attorney] could, we think, properly assume that expert testimony could not be compelled . . . We find no waiver of the attorney-client privilege. 519 F.2d 1036, 1046.

The discovery order in the instant case contains substantially the same requirements as those found in Rules 12.2 and 16 of the Federal Rules of Criminal Procedure. Here, the defendant was required to notify the government of his intent to use the defense of diminished mental capacity and was required to

provide the medical reports which were prepared by a defense witness who would testify concerning the contents thereof.[5] (App. 12a-13a)

The discovery order required that the information which it contemplated be produced on or before July 1, 1980, approximately thirty-three days after the indictment. To conceal Dr. Mutter's report from the government, defendant's counsel would have had to make a determination at that early stage that he did not intend to use Dr. Mutter as a witness at a trial six months later. Requiring the defendant's attorney to make this determination at such an early stage in the proceedings severely restricted him in the preparation of his defense.

Implicit in the basic waiver issue is the question whether the attorney may waive this

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5 Prior defense counsel perhaps misconstrued the Standing Discovery Order when Dr. Mutter's report was furnished to the government and if so, such error should not be imputed to the defendant.

privilege on behalf of his client. The attorney-client privilege is not that of the attorney but of the client. Chirac v. Reinicker, 24 U.S. 280 (1826). Waivers of counsel must not only be voluntary, but also must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. Johnson v. Zerbst, 304 U.S. 358 (1938). As pointed out in Estelle v. Smith, 451 U.S. at 466, a defendant may not be aware of the scope of the fifth amendment. The assertion of that right often depends upon legal advice from someone who is trained and skilled in the subject matter.

As previously noted, the standing discovery order in the instant case contains requirements similar to those in Rule 16 of the Federal Rules of Criminal Procedure. Although that rule is not here in issue, it is perhaps apposite to note that Mr. Justice Douglas had some serious constitutional questions concerning

that rule as reported in 39 F.R.D. 69, page 277 (1966), in which he stated:

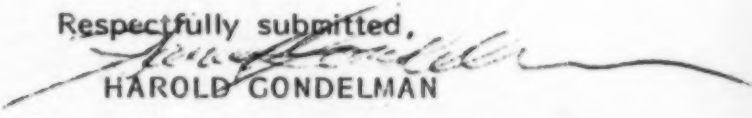
> But if discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of a constitutional right? . . . To deny a defendant the opportunity to discovery . . . merely because the defendant chooses to exercise a constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege.

If Mr. Justice Douglas was troubled with the application of Rule 16(c) within constitutional limitations, it is difficult in the extreme to understand how a layman, even after consultation with his attorney, could make an intelligent waiver of his fundamental constitutional rights under the fifth and sixth amendments.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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Appendix

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5205

APRIL 7, 1982

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT JOHN SECHAN,

Defendant-Appellant.

- - - - - - - - - - -

Appeal From the United States District Court
for the Southern District of Florida

- - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 22, 11 Cir., 1982, F.2d.).

Before: VANCE, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/s/ R. L. Anderson
United States Circuit Judge

REHG-6

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5205

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT JOHN SECHAN

Defendant-Appellant

Appeal From the United States District
Court for the Southern District of Florida

(February 22, 1982)

Before VANCE, HATCHETT and ANDERSON,
Circuit Judges.

PER CURIAM.

AFFIRMED. See Circuit Rule 25.

/s/ JAH
/s/ RLA
/s/ RSV

APPENDIX

ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-6049-CR_JAG

UNITED STATES OF AMERICA,

Plaintiff

vs. January 9, 1981

ROBERT JOHN SECHAN,

Defendant

THIS CAUSE has come before the Court for review upon Defendant's Motion for New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The Court has considered the record and being otherwise duly advised, it is

ORDERED AND ADJUDGED that Defendant's Motion for New Trial be and the same is hereby DENIED.

APPENDIX

Order, United States District Court
Southern District of Florida

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 9th day of January, 1981.

/s/ Jose A. Gonzalez J.
UNITED STATES DISTRICT JUDGE

cc: All counsel

APPENDIX

Excerpts From Judgment and Commitment Order - February 20, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs. No. 80-6049-CR-JAG

ROBERT JOHN SECHAN

* * *

There being a finding of GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to distribute a quantity of cocaine, a Schedule II controlled substance, a violation of Title 21, U.S. Code, Section 841(a)(1), in violation of Title 21, U.S. Code, Section 846, as charged in Count one; possession with intent to distribute cocaine, in violation of Title 21, U.S. Code, Section 841(a)(1), and Title 18, U.S. Code, Section 2, as charged in count two; and distribution of cocaine, in violation of Title 21, U.S. Code, Section 841(a)(1) and Title 18, U.S. Code, Section 2, as charged in count three.

* * *

APPENDIX

Excerpts From Judgment and Commitment Order - February 20, 1981

SIX (6) YEARS imprisonment as to count one charged in the indictment.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) YEARS, followed by a special parole term of FIVE (5) YEARS as to count two charged in the indictment.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General of (sic) his authorized representative for imprisonment for a period of SIX (6) YEARS, followed by a special parole term of FIVE (5) YEARS as to count three charged in the indictment.

APPENDIX

Excerpts From Judgment and Commitment Order - February 20, 1981

It is a FURTHER ORDER of this Court that the sentence imposed as to counts two and three shall run concurrently with the sentence as to count one, so that the total period of incarceration shall be a period of SIX (6) YEARS followed by a special parole term of FIVE (5) YEARS.

ORDERED AND ADJUDGED that execution of sentence be deferred at this time. The defendant shall voluntarily surrender to the facility to be designated by the Attorney General no later than noon on Wednesday, March 18, 1981.

Signed by
U.S. District Judge /s/ Jos. A. Gonzalez,J.

Date 2/20/81

APPENDIX

STANDING DISCOVERY ORDER - June 6, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 80-6049-CR-JAG

UNITED STATES OF AMERICA
vs.
ROBERT JOHN SECHAN,
ROGER KAPLAN,
BRUCE LANDESMAN,
GIOVANNI RUBINO and
HEATHER GLADDING

Good cause appearing, it is

ORDERED AND ADJUDGED that on or before July 1, 1980 the parties shall confer and the following shall be accomplished.

APPENDIX

STANDING DISCOVERY ORDER - June 6, 1980

A. The government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof which are within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the government.

(1) Written or recorded statements made by the defendant.

(2) The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a then known to be government agent which the government intends to offer in evidence at trial.

(3) Recorded grand jury testimony of the defendant relating to the offenses charged.

(4) The defendant's F.B.I. arrest record.

(5) Books, papers, documents, photographs, tangible objects, buildings or places which the government intends to use as evidence at trial to prove its case in chief, or were obtained from or belong to the defendant.

(6) Results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with this case.

B. The defendant shall permit the government to inspect and copy the following items or copies thereof, or supply copies thereof which are within the possession, custody or control of the defendant, the existence of which is known or by the exercise of due diligence may become known to the defendant.

APPENDIX

STANDING DISCOVERY ORDER - June 6, 1980

(1) Books, papers, documents, photographs or tangible objects which the defendant intends to introduce as evidence in chief at the trial.

(2) Any results or reports of physical or mental examinations and of scientific tests of experiments made in connection with this case which the defendant intends to introduce as evidence in chief at trial or which were prepared by a defense witness who will testify concerning the contents thereof.

(3) If a defendant intends to rely upon the defense of insanity at the time of the alleged crime or intends to introduce expert testimony relating to a mental disease, defect or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he

shall give written notice thereof to the government.

C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilty or punishment within the scope of Brady v. Maryland, 373 U.S. 83 (1963).

D. The government shall disclose to the defendant the existence and substance of any payments, promises of immunity, leniency, or preferential treatment, made to prospective government witnesses, within the scope of United States v. Giglio, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959).

E. The government shall supply the defendant with a record of prior convictions of any

alleged co-conspirator, accomplice or informant who will testify for the government at trial.

F. The government shall state whether the defendant was the subject of any electronic surveillance, and, if so, shall set forth in detail the circumstances thereof.

G. The government shall have transcribed the grand jury testimony of all witnesses who will testify for the government at the trial of this cause, preparatory to a timely motion for discovery.

H. The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and the early resolution of which will expedite the trial.

APPENDIX

STANDING DISCOVERY ORDER - June 6, 1980

1. The parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference. No stipulations made by defense counsel at the conference shall be used against the defendant unless the stipulations are reduced to writing and signed by the defendant and his counsel. This statement, including any stipulations signed by the defendant and his counsel, shall be filed with the Court within five days following the conference.

It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this Standing Order.

Upon a sufficient showing the Court may at any time upon motion properly filed, order that

STANDING DISCOVERY ORDER - June 6, 1980

the discovery or inspection provided for by this Standing Order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this Standing Order.

All motions concerning matters not covered by this Standing Order must be filed pursuant to Local Rule 10G, within July 1 days of this order.

DONE AND ORDERED at Fort Lauderdale, Florida, this 6th day of June, 1980.

/s/ Patricia Jean Kyle
UNITED STATES MAGISTRATE
PATRICIA JEAN KYLE

APPENDIX

Excerpts From Transcript of Testimony
December 16, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff

vs. No. 80-6049-CR-JAC

ROBERT JOHN SECHAN,

Defendant

(Tr. p. 205)

DIRECT EXAMINATION

BY MR. ZIMET:

Q. State your full name.

A. Doctor Charles B. Mutter.

Q. And tell the Court what your professional occupation is.

APPENDIX

Excerpts From Transcript of Testimony
December 16, 1980

A. I am --

MR. CARE: I'm just saying I would stipulate to his professional qualifications. My purpose of my voir dire is I do not believe that Doctor Mutter has the right to testify since he is, number one, he's been hired initially by Mr. Sechan and has never received Mr. Sechan's approval to breach his confidential relationship with Mr. Sechan and it is beyond me how the U.S. Attorney could call and speak with Doctor Mutter without getting the Court's permission or the permission of the client, and this is the purpose of my voir dire, not his qualifications as a psychiatrist.

MR. ZIMET: Mr. Hirschorn had sent me Doctor Mutter's report, the results of his examination. I notified Mr. Hirschorn that I would be calling Doctor Mutter as my witness and felt no need to incur further expense by

hiring another psychiatrist to analyze Mr. Sechan when he had already been analyzed by his own doctor.

* * *

(Tr. p. 207)

* * *

MR. CARB: I think Mr. Hirschorn would also agree that he has never waived Mr. Sechan's privilege to communicate these records.

THE COURT: Well, I'm going to get to that in a minute, but secondly, I think that when Mr. Hirschorn furnished Doctor Mutter's report to the United States Attorney, that in effect was a waiver, but more basically than that, there is no privilege in the Federal system as to this

type of testimony, that being the privilege of a psychiatrist and patient, and I presume you're a psychiatrist, right, Doctor?

THE WITNESS: Yes, sir.

* * *

(Tr. p. 208)

* * *

The only privilege that exists is attorney/client privilege. There is no such doctor/patient privilege. There is no Federal privilege, so the testimony is not privileged.

MR. CARR: I would like to place my objection on the record.

APPENDIX

Excerpts From Transcript of Testimony
December 16, 1980

THE COURT: The objection is noted and overruled and it would be the ruling of the Court that privilege which the Defendant seeks to assert is not available.

MR. CARB: My reasoning, Your Honor, that Doctor Mutter was Mr. Sechan's psychiatrist, paid by Mr. Sechan and Mr. Sechan related to him facts of activity in this case and possibly other activities that will be brought out by Doctor Mutter's testimony that I believe will be prejudicial to Mr. Sechan and that Doctor Mutter, without seeking, number one, a waiver of Mr. Sechan's privilege, what I still believe is privileged communication, or number two, without complying with the Rules of this Court in supplying us with the writing, with the copy of the report is first not allowed to talk about the report and second should be restricted to the ambience of that report and not allowed to go in any direction father than that report presently stated.

APPENDIX

Excerpts From Transcript of Testimony
December 16, 1980

MR. HIRSCHORN: I complied with the standing discovery order in this case which required me as Mr.

* * *

(Tr. p. 211)

* * *

Q. Can you describe to the Court what your assignment was in your evaluation?

A. The major function was standards where I have been appointed and asked to examine other Defendants.

Number one was to determine his present mental state, whether or not he had mental disorders, whether or not he needed any type of treatment.

* * *

APPENDIX

Excerpts from Transcript of Testimony December 16, 1980

(Tr. p. 213)

* * *

Q. Can you tell the Court what specific conclusions you made concerning Mr. Sechan as a result of your interview?

A. Well, it was my opinion that he had a rational and factual understanding of the proceedings against him and was capable of aiding counsel.

Q. Do you mean by that he understood the proceedings, he knew the function of a Judge or Jury?

A. The purpose of the lawyer representing him and what the Federal Prosecutor's role would be.

APPENDIX

Excerpts from Transcript of Testimony December 16, 1980

He understood conviction versus acquittal and the possible consequences therein.

These were the questions that I attempted to discovery from him in terms of his thinking. What I am saying, he was able to understand and process this information in a rational, coherent fashion.

* * *

(Tr. p. 215)

* * *

A. In general questioning, I asked him not as to whether or not he did something or not, but his ability to process information, about the nature and quality of this type of act.

APPENDIX

Excerpts from Transcript of Testimony December 16, 1980

Q. What was the purpose of those questions?

A. To determine his mental state at the time of the alleged offense in which he is charged.

Q. Were you able to come up with any conclusions as a result of the questioning?

A. Yes.

Q. What were these mental conclusions?

A. It was my opinion that he was not suffering from any mental disorder or defect.

Q. Can you explain that?

A. He knew right from wrong and understood the conditions of his act.

APPENDIX

Excerpts from Transcript of Testimony December 16, 1980

A. Is it your opinion that he knew he was involved in a cocaine transaction?

MR. CARB: Leading.

THE COURT: Overruled.

THE WITNESS: He knew that he was approached by someone who was trying to get him to sell some cocaine.

Q. (By Mr. Zimet) Did he realize that that was wrong

APPENDIX

Excerpts from Transcript of Testimony
December 16, 1980

(Tr. p. 216)

* * *

A. Well, this individual has had a drug habit for a long period of time and there were periods of time where he was not able to function consistently. When he was under pressure, he would resort to drug misuse. It was my opinion, based on what he told me, at the time of the alleged offense and arrest that he was spaced out at that time and I felt that, usually my opinion is when individuals misuse drugs, they have diminished mental capacity, otherwise they wouldn't misuse them in the first place.

I didn't feel that it was - that he was incapable of knowing what he was doing. He also advised me he didn't have any source. He had never sold them. He had used them, but never sold them and was trying to impress a friend.

APPENDIX

Excerpts from Transcript of Testimony December 16, 1980

(Tr. p. 225)

* * *

Q. Which in essence I introduced Mr. Sechan to you and asked you to evaluate him. Do you recall our conversation when I asked you to evaluate his mental state as to the time you were seeing him as opposed to his mental state with respect to the time of the commission of the offense?

I am not asking you to look at my letter. I am asking about the phone conversation we had before.

A. Well, I don't recall that exactly, if you said that. I did not make a notation of our phone conversation. I do recall that you asked me to see him and you were certainly interested in his mental state.

APPENDIX

Excerpts from Transcript of Testimony December 16, 1980

Q. Do you recall that I called you and you squeezed him into your calendar because I was concerned about Mr. Sechan's ability to communicate even with me?

A. Yes, I do recall something to that effect.

Q. Do you recall in our conversation, I told you we weren't certain as to whether we were going to raise legal insanity as an offense, but I wanted your feelings about that?

A. Yes.

* * *

APPENDIX

Excerpts from Transcript of Testimony December 16, 1980

(Tr. p. 251)

* * *

Q. (By Mr. Hirschorn) Listen to my question carefully, Doctor.

Did you arrive at an opinion as to whether between April 21st, 1980 an May 10, 1980, Mr. Sechan lacked the substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law?

A. Yes.

Q. What is that opinion?

A. My opinion is that Mr. Sechan did not have the ability to appreciate the rightfulness or wrongfulness of his act.

APPENDIX

Excerpts from Transcript of Testimony
December 16, 1980

Q. Of his conduct?

A. Of his conduct.

(Tr. p. 252)

Q. Did he have substantial capacity to conform his conduct to the requirements of the law in your opinion?

A. No, he did not.

MR. ZIMET: Objection, previously asked and answered.

THE COURT: Overruled.

Q. (By Mr. Hirschorn) On what do you base that opinion?

APPENDIX

Excerpts from Transcript of Testimony
December 16, 1980

A. On my clinical evaluation of Mr. Sechan in the hospital, on his past history, and on my evaluation of his past hospital psychiatric evaluations.

Q. Now, Doctor, we are going to come back to exactly what all that means, but I'm going to ask you another opinion question.

Did you arrive at an opinion based upon your diagnosis in the treatment Mr. Sechan was subjected to as to whether or not between April 21st and May 10th, 1980, Mr. Sechan had a mental disease or defect which substantially affected his mental or emotional processes and thereby substantially impaired his behavior controls?

APPENDIX

Excerpts from Transcript of Testimony
December 16, 1980

A. Yes, I do.

Q. What was that?

A. My opinion was that he had a mental disease or defect which did substantially impair his mental controls.

* * *

(Tr. p. 277)

* * *

Q. Did you look through that statement to see if there were any words attributed to Mr. Sechan between April 21st and May 20th which confirmed what you're talking about with respect to ego need?

APPENDIX

Excerpts from Transcript of Testimony
December 16, 1980

A. Yes, I did, and I think there were many words in this statement that fitted in with the delusion of grandeur that Mr. Sechan had.

The mentioning of large sums of money, the mentioning of large amounts of cocaine, the ability to produce, and I want to emphasize that factor.

We have somebody who is feeling inferior, unable to produce in the family business, and here's presenting himself to somebody else as somebody able to produce in terms of drug supply.

Q. Taking everything into consideration that you have just gone over, what you have told us, based on reasonable medical certainty with respect to Mr. Sechan,

APPENDIX

Excerpts from Transcript of Testimony
December 16, 1980

(Tr. p. 278)

would you be able to confirm his conduct to the requirements of the law when confronted with large quantities of money by the Drug Enforcement Administration, the confidential informant, for the sale of cocaine?

A. No, he would not be able to conform his behavior to the requirements of the law. He would be motivated by his psychological need.

Q. He would not have the substantial capacity to conform his conduct to the requirements of the law?

A. No, he would not.

APPENDIX

Excerpts from Transcript of Testimony December 16, 1980

Q. What about the fact that Mr. Sechan became upset and insulted when he was called nothing more than an incompetent street peddler?

What effect would that have on his ability to have the substantial capacity to conform his conduct to the requirements of the law?

A. He would be unable to conform to the requirements of the law. Again, picture his psychological state at the time.

* * *

Opposition

Office-Supreme Court, U.S.
FILED
JUL 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2054

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT JOHN SECHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's use of testimony by a psychiatrist originally retained by petitioner intruded upon petitioner's attorney-client privilege and thereby deprived him of his Sixth Amendment right to assistance of counsel.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1982. A petition for rehearing was denied on April 7, 1982. The petition for a writ of certiorari was filed on May 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a bench trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1), and of possessing cocaine with intent to distribute it and distributing it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Counts 2 and 3). He was

sentenced to concurrent six-year terms of imprisonment on each count, to be followed by concurrent five-year special parole terms on Counts 2 and 3 (Pet. App. 6a-7a).

The offenses of which petitioner was convicted arose from an agreement by petitioner and others to sell 20 kilograms of cocaine to a DEA agent for $1.2 million. The parties met initially in Chicago and again later in Florida to arrange the details of delivery and payment. Petitioner was arrested following the completion at a Florida hotel of the first of several planned deliveries of cocaine.

As a defense to the charges, petitioner gave notice of his intent to claim that he was insane at the time of the offense. Consistent with this design, petitioner submitted to the government the report of Dr. Mutter, a psychiatrist petitioner had retained to render an opinion about petitioner's sanity.[1]

At trial, petitioner did not call Dr. Mutter. Instead, he called Dr. Cerul, who testified that at the time of the offense petitioner was suffering from a mental disease or defect that substantially impaired his mental control, could not appreciate the unlawfulness of his acts, and was unable to conform his conduct to the requirements of the law (Pet. App. 30a-36a). The opinion was based upon Dr. Cerul's clinical examination of petitioner, petitioner's past history, and Dr. Cerul's assessment of petitioner's prior psychiatric evaluations (Pet. App. 32a). To rebut this testimony, the

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[1]The report was submitted pursuant to the Standing Discovery Order entered by the magistrate on June 6, 1980 (Pet. App. 9a-16a). This order is entered routinely in criminal cases in the district court of that district, and petitioner did not object to its entry. Paragraph B(2) of the Discovery Order requires the defendant to provide the government with reports of mental examinations "made in connection with this case which the defendant intends to introduce as evidence in chief at trial or which were prepared by a defense witness who will testify concerning the contents thereof" (Pet. App. 11a-12a).

government called Dr. Mutter. He testified that petitioner was not suffering from any mental disease or defect, that he knew right from wrong, and that he knew he was selling cocaine (Pet. App. 24a-25a). The district court denied petitioner's motion to exclude Dr. Mutter's testimony and found petitioner guilty on all counts.

2. On appeal, petitioner argued that when the government called Dr. Mutter to testify about petitioner's sanity, it violated his Fifth Amendment privilege against self-incrimination and deprived him of due process because his statements to Dr. Mutter formed the basis of his conviction. The court of appeals affirmed the conviction without opinion (Pet. App. 3a).

ARGUMENT

Petitioner contends (Pet. 6-12) that the government's use of Dr. Mutter's testimony intruded upon his counsel's consultative process and thereby deprived petitioner of his Sixth Amendment right to assistance of counsel. We note at the outset that petitioner did not object on this ground to the admission of Dr. Mutter's testimony at trial. Nor was the point raised in the court of appeals until a petition for rehearing was filed. Consequently, it is waived.[2] Fed. R. Evid. 103(a)(1); *United States* v. *Rubin*, 609 F. 2d 51, 62-63 (2d Cir. 1979), aff'd, 449 U.S. 424 (1981); *United States* v.

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[2]Although petitioner did challenge the government's use of Dr. Mutter's testimony, his objection in the trial court was based on a purported psychiatrist-patient privilege. Tr. 205-208. In the court of appeals petitioner claimed that admission of Dr. Mutter's testimony violated his privilege against self-incrimination. The court of appeals' per curiam affirmance thus cannot be construed as a judgment on the attorney-client and Sixth Amendment theory; it consequently presents no conflict with the Third Circuit's decision in *United States* v. *Alvarez*, 519 F. 2d 1036, 1045-1047 (1975). To the extent that *Alvarez* differs from the views expressed here, the government disagrees with its approach.

Lovasco, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's argument is without merit.

Petitioner put his sanity at issue when he raised the defense of insanity at the time of the offense. Fed. R. Crim. P. 12.2(c) states—and several courts of appeals have held—that when a defendant asserts the insanity defense and introduces supporting psychiatric testimony, he can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. See, *e.g.*, *United States* v. *Cohen*, 530 F. 2d 43, 47-48 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *Karstetter* v. *Cardwell*, 526 F. 2d 1144, 1145 (9th Cir. 1975); *United States* v. *Bohle*, 445 F. 2d 54, 66-67 (7th Cir. 1971); *United States* v. *Weiser*, 428 F. 2d 932, 936 (2d Cir. 1969), cert. denied, 402 U.S. 949 (1971); *United States* v. *Albright*, 388 F. 2d 719, 724-725 (4th Cir. 1968); *Pope* v. *United States*, 372 F. 2d 710, 720-721 (8th Cir. 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651 (1968). See also *Estelle* v. *Smith*, 451 U.S. 454, 465 (1981) (dictum). To hold otherwise would deprive the government of the only effective means it has of controverting the defendant's proof on an issue he has interjected into the case (*ibid.*).

Petitioner claims that his case is somehow different because Dr. Mutter, the psychiatrist called by the government, interviewed him at the behest of his own counsel. One basis for that claim might be that petitioner had revealed privileged information to Dr. Mutter, which was then relayed to the government. Petitioner does not identify any such communication, other than those related to his mental state at the time of his offense. And with regard to discussion about his sanity, petitioner's objection makes sense only if he also contends that he would not behave the same way, or would not cooperate at all, with a psychiatrist the government retained. But since he is required to cooperate fully with the government's expert (see Fed. R. Crim. P.

12.2(d)); *Karstetter* v. *Cardwell, supra,* 526 F. 2d at 1145), it makes little difference that the psychiatrist the government called had interviewed petitioner in the first instance at his own counsel's request. See *Granviel* v. *Estelle,* 655 F. 2d 673, 679-683 (5th Cir. 1981), cert. denied, No. 81-1011 (Mar. 8, 1982); *United States ex rel. Edney* v. *Smith,* 425 F. Supp. 1038 (E.D.N.Y. 1976) (Weinstein, J.), aff'd, 556 F. 2d 556 (2d Cir. 1977).[3] A psychiatrist's examination is not an adversarial proceeding. It does not determine guilt or innocence and ought not to be a partisan endeavor. The doctor renders an opinion of mental status based upon the individual's past history and his own clinical examinations. If a defendant cooperates in the manner contemplated by the Federal Rules of Criminal Procedure, see Rule 12.2(d), what he discloses to his own psychiatrist should be no different from what he tells the person engaged by the government.

Moreover, a defendant cannot be prejudiced, as petitioner suggests (Pet. 12), by statements he makes to a psychiatrist in the course of an examination because such statements are admitted for the limited purpose of establishing the basis for the psychiatrist's evaluation, and cannot be admitted to establish the fact that the defendant committed a crime. Fed. R. Crim. P. 12.2(c); *Granviel* v. *Estelle, supra,* 655 F. 2d at 683; *United States* v. *Cohen, supra,* 530 F. 2d at 47 & n.13; *United States ex rel. Edney* v. *Smith, supra,* 425 F. Supp. at 1054. And whatever prejudice might accrue despite that limitation from the introduction of such testimony in a jury trial, there is no such concern where, as here, the district court heard the case without a jury.

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[3]To suggest otherwise would permit a defendant to shop around for a "friendly" expert and at the same time—under the guise of attorney-client privilege—to remove from the market available to the government expert witnesses who had already formulated a contrary opinion at the defendant's request.

On the other hand, petitioner might feel that his case is different from one where the government retained its own psychiatrist because a defendant's counsel may reveal to an initially "friendly" psychiatrist information of strategic importance, which can then be passed on to the government (Pet. 12). Whatever basis such a concern might have in other cases, the record here does not show that petitioner's counsel discussed his theory of the case with Dr. Mutter. Indeed, it shows no communication between petitioner's counsel and Dr. Mutter at all, other than the initial request that the doctor render an opinion on petitioner's competence to stand trial and his sanity at the time of the offense (Pet. App. 28a-29a), the transmittal of petitioner's medical reports (Tr. 217), and the doctor's final written report. Under these circumstances, petitioner has not succeeded even in sustaining his burden of proof that the attorney-client privilege applies, see *FTC* v. *TRW, Inc.*, 628 F. 2d 207, 213 (D.C. Cir. 1980); *United States* v. *Stern*, 511 F. 2d 1364, 1367-1368 (2d Cir. 1975), much less demonstrated sufficient prejudice to constitute a Sixth Amendment violation. See *United States* v. *Morrison*, 449 U.S. 361, 366 (1981).

Contrary to petitioner's claim (Pet. 9-12), the decision of the court of appeals is not inconsistent with this Court's decision in *Estelle* v. *Smith*, *supra*. That case held that "[a] criminal defendant, *who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence*, may not [consistent with the Fifth Amendment] be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding" (451 U.S. at 468) (emphasis added). The Court was careful to emphasize that "a different situation arises where a defendant intends to introduce psychiatric evidence * * *" (*id.* at 472). Here petitioner raised the issue of his sanity at trial and introduced the testimony of his treating psychiatrist.

Moreover, he was not compelled, but voluntarily elected, to consult Dr. Mutter. In such a case the government must be entitled to use the results of the examination of the defendant, voluntarily disclosed to the prosecution by the defense.

The Court in *Estelle* v. *Smith* held that use of statements made by Smith during a competency examination violated his Sixth Amendment right to counsel as well as his privilege against self-incrimination (451 U.S. at 469-471). The examination of Smith was ordered by the court without the knowledge or consent of defense counsel, who could have aided Smith in deciding whether to submit to the examination at all, and whether to permit exploration therein of the issue of future dangerousness (*id.* at 471).[4] Where the defendant has interjected the defense of insanity and chosen to submit psychiatric proof, however, refusing to submit to an examination on behalf of the government is no longer an option, see Fed. R. Crim. P. 12.2(d), and the government is at least entitled in its examination to cover the same ground the defendant proposes to explore at trial. Reliance on an examination undertaken at petitioner's request thus frustrates neither of the Sixth Amendment concerns voiced in *Estelle* v. *Smith*.[5]

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[4]This Court emphasized that Smith did not assert "any constitutional right to have counsel actually present during the examination," and noted the court of appeals' conclusion that such a right might be seriously disruptive. 451 U.S. at 470 n.14.

[5]Petitioner also argues (Pet. 13-17) that the district court wrongly ruled that petitioner waived any attorney-client privilege when he produced Dr. Mutter's report pursuant to the Standing Discovery Order. Because, as we have explained above, petitioner's prior consultation with Dr. Mutter created no attorney-client privilege and did not bar the government's use of his testimony, the district court's waiver ruling is of no significance. The government's discovery of Dr. Mutter's opinion from petitioner was simply a fortuity. The result would have been the same if petitioner had not produced the report but the government had independently and coincidentally consulted Dr. Mutter after petitioner's consultation. See *United States* v. *White*, 617 F. 2d 1131, 1135 (5th Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1982

DOJ-1982-07